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No. 82-427

In the Supreme Court of the United States

October Term, 1982

ASHOK K. GUMBHIR,
Petitioner,

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION

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RESPONSE BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

I. THE SUPREME COURT OF THE STATE OF KANSAS ACTED PROPERLY IN RE-EXAMINING PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS IN DETERMINING WHETHER AN AWARD OF ATTORNEY'S FEES SHOULD BE GRANTED UNDER 42 U.S.C. §1988.

The issues presented in Mr. Gumbhir's Petition For Writ of Certiorari are not novel to this Court. Recently, this Court, in a unanimous opinion, held that a court's de-

cision of entitlement to fees will require an inquiry separate from the decision on the merits. That inquiry cannot even begin until one party has prevailed. *White v. New Hampshire Department of Employment Security*, 455 U.S. ....., 71 L.Ed. 2d 325, 102 S.Ct. 1162 (1982).

> "Section 1988 provides for awards for attorney's fees only to a 'prevailing party'. Regardless of when attorney's fees are requested, the court's decision on entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed'. Nor can attorney's fees fairly be characterized as an element of 'relief' indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under §1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial." *White, supra.*

The *White* case culminated a firmly established trend set by the federal courts that, prior to awarding attorney's fees under §1988, a court must have sufficient exposure to the facts and laws of the case before it is able to determine if the plaintiff's civil rights have been violated. This trend had its judicial origins in the Second Circuit decision of *Nadeau v. Helgemoe*, 581 F.2d 275 (2d Cir. 1978), although the legislative history surrounding the enactment of the Civil Rights Attorney's Fees Award Act of 1976 demonstrated that Congress clearly anticipated the need for a separate determination on the constitutional issues where a party prevails on a non-fee claim.

> "To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 154 60 with a claim that does not allow attorney's fees, that plaintiff, if it

prevails on a non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973).

H.R. 94-1558, p. 7, n.14, 94 Cong., 2d Sess. (1976).

Attorney's fees were not awarded in *Nadeau, supra*, where the legal issues were still in dispute at the time the consent decree was signed and there had never been a final judicial determination of whether or not the plaintiffs had been deprived of their constitutional rights.

In 1980, the United States Supreme Court further encouraged development of the policy to independently review the federal claims when the case had been disposed of on non-fee grounds or by settlement. In *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed. 2d 670 (1980), *reh. denied*, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed. 2d 1176 (1980), this Honorable Supreme Court held that attorney's fees are appropriate under 42 U.S.C. §1988 only where there has been a determination of the "substantial rights" of the parties which Congress determined was a necessary foundation for departing from the usual rule that each party was to bear the expense of his or her own attorney. In *Hanrahan*, this Court ruled that the plaintiffs were not "prevailing parties" for the purpose of an award of attorney's fees under §1988, notwithstanding the fact that they had secured reversal of a judgment entered against them. This Court refused to allow an award of attorney's fees because there had been no determination of the substantial rights of the parties under the civil rights statutes.

Finally, just this year, this Honorable Court decided that a decision of entitlement to attorney's fees under

§1988 will require an inquiry separate from any decision on the merits. Any attorney's fee award is uniquely separable from the cause of action to be proved at trial. *White, supra.* Without a judicial determination of the substantial rights of the parties the awarding of attorney fees under §1988 would be without foundation.

Petitioner's primary objection is with the Kansas Supreme Court's re-examination of petitioner's federal constitutional claims for the sole purpose of attorney's fees. Respondent contends that the Kansas Court's independent review of Gumbhir's federal constitutional claims was not only warranted under state and federal law, but was necessary for a fair and just determination of whether attorney's fees were appropriate in this instance.

In the matter now before the Court, the Petitioner did not request an award of attorney's fees until the case had been finally decided by the highest state court. (R. Vol. I, pp. 74-76). Because there was no issue of attorney's fees under 42 U.S.C. §1988 at the time the Kansas Supreme Court examined the merits and substantive issues presented in *Gumbhir (I) v. Kansas State Board of Pharmacy*, 228 Kan. 579, 618 P.2d 837 (1980), federal questions were never examined as the Kansas Supreme Court reached a result based solely on state law grounds.

Prior to the Kansas Supreme Court's final decision that attorney's fees should not be awarded, the only judicial determination of the substantial rights of the parties was made by the Johnson County District Court. In its first decision, that court determined in a well reasoned opinion that no federal claim asserted by petitioner had been abridged. (Appendix A). The Supreme Court of Kansas reversed on State law grounds without examining petitioner's federal claims. The same lower court then,

on motion for fees, determined that petitioner was not a prevailing party within the meaning of §1983. (Appendix B). Faced with two lower court determinations that no federal right of petitioner had been abridged and that petitioner was not a prevailing party within the meaning of §1983, it was incumbent upon the Kansas Supreme Court, in accord with *White, supra,* and *Hanrahan, supra,* to:

> "re-examine the case to ascertain if the State's action involved a common nucleus of operative fact with a substantial federal claim constituting a deprivation of Gumbhir's federal rights, privileges and immunities." *Gumbhir (II) v. Kansas State Board of Pharmacy,* 231 Kan. 507, 518, 646 P.2d 1078 (1981).

The Kansas Supreme Court rejected the Petitioner's argument that the *mere allegation* of a substantial claim of deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States is sufficient to trigger the fee shifting mechanism of 42 U.S.C. §1988. The Kansas Supreme Court thoroughly analyzed Petitioner's complaints of federal constitutional violations, concluding that Gumbhir was not deprived of any rights under the federal Constitution and that his State claim,

> ". . . did not involve a common nucleus of operative facts with a substantial federal claim because the Kansas State Board of Pharmacy did not subject Gumbhir to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. Thus, Gumbhir is not a prevailing party as required since there was no 42 U.S.C. §1983 violation upon which a civil rights attorney fee claim could be based." 231 Kan. at 523.

II. THE STANDARD FOR DETERMINING WHETHER AN AWARD OF ATTORNEY'S FEES UNDER §1988 SHOULD BE GRANTED IS ADEQUATE AND SHOULD NOT BE CHANGED.

Congress, anticipating the need for a separate determination on the constitutional issues when a party prevails on non-fee claims, set forth the standard that is to be applied in awarding fees in such circumstances:

> "In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality test', see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), attorney's fees may be allowed even thought the court declines to enter judgment for plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact'."
>
> H.R. 94-1558, 94th Cong., 2d Sess., p. 4, n.7 (1976).

Petitioner proposes that this standard merely requires an examination of the federal claims to determine if they are "wholly insubstantial", "obviously frivolous", "plainly insubstantial" or "obviously without merit". Petitioner's proposition ignores the two-pronged nature of the standard. The House Report clearly indicates that both *Hagans, supra*, and *United Mine Workers, supra*, are to be considered. There must be both a "substantial" federal claim and that claim must arise out of a "common nucleus of operative facts".

Both *Hagans, supra,* and *United Mine Workers, supra,* dealt with the issue of whether a federal district court had authority to entertain a state law claim which was pendent to the jurisdictionally conferring federal constitutional claims. Under *Siler v. Louisville and Nashville R. Co.,* 213 U.S. 175 (1909), a federal court should, faced with both claims, decide the case on statutory grounds, without reference to the Constitution. The question then, of whether federal courts could entertain state issues, given the preference for adjudication on state claims under *Siler,* was an important one. A party could utilize the federal courts by alleging federal constitutional grounds but adjudication would resolve only the pendent state law claims. Forum shopping would be possible and the preemption doctrine disregarded without some express guidelines as to when a federal court could entertain the pendent state claim.

The Supreme Court, in *United Mine Workers, supra,* 383 U.S. at 727, while holding that the district court was proper in addressing the state law claim, stated that in instances where,

> "it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

This Court allowed the federal court to entertain the state law claim in *United Mine Workers,* because

> "[P]endent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] constitution', . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case' . . . . The state and federal claims must derive from a common nucleus of operative fact." 383 U.S. at 725.

The "real body" of the Gumbhir case is his state claim, the federal claims being only appendages. Gumbhir prevailed solely on the state grounds that K.S.A. §65-1631 constituted an unlawful delegation of legislative authority. This action did not comprise but "one constitutional case". A decision of the state grounds did not affect, even remotely, the federal constitutional issues.

In *Hagans, supra,* 415 U.S. 528, the plaintiff challenged a provision of the New York Code of Rules and Regulations on both federal constitutional and state statutory grounds. This Honorable Court found that there was but one "single wrong" and the claims which rested on identical facts, were little more than the equivalent of different epithets to characterize the same circumstances. This Court affirmed the lower court's decision to adjudicate the state claim holding that the statutory claim was in reality, a constitutional one. Under *Hagans* and *Mine Workers'* federal courts were given the power to entertain pendent state law claims as long as the federal and state claims arose from the same nucleus of operative facts and were so inextricably interwoven that a decision on the state claim was implicitly a decision on the federal question as well.

Given the preference for adjudication of the state claim only, Congress understandably was concerned that deserving plaintiffs under §1983 would not receive attorney's fees when they prevailed solely on state, non-fee grounds. Congress made clear its intent that where both the *Hagans* and *Mine Workers* tests have been met, attorney's fees may be properly awarded. H.R. 94-1558, p. 7, n.14, 94 Cong., 2d Sess. (1976). Congress did not intend to award fees where the federal claims are insubstantial and unsupportable on the merits. *Southeast Legal Defense*

Group v. Adams, 436 F.Supp. 891 (1977). Congress intended that plaintiffs, who couple their constitutional claims with meritorious statutory claims, not be denied attorney fees when they prevail solely on state grounds, as long as the federal claims are substantial and as long as the state and federal claims are so inextricably bound so as to comprise but one constitutional case. *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977).

The Kansas Supreme Court re-examined petitioner's federal claims, applying the standard set forth in House Report 94-1558. The Kansas Supreme Court found that Gumbhir had not been deprived of any right, privilege or immunity protected under the U.S. Constitution and laws. The wrong upon which he prevailed was the unlawful delegation of authority by the Kansas legislature. Petitioner's federal claims were only appendages to his state claim; they did not arise out of the same nucleus of operative facts and, as held by the Kansas Supreme Court, were insubstantial and without merit.

III. PETITIONER'S STATE CLAIMS DID NOT INVOLVE A COMMON NUCLEUS OF OPERATIVE FACTS WITH A SUBSTANTIAL FEDERAL CLAIM.

Before this Honorable Court is an action wherein the state claim is separate and distinct and does not arise out of a common nucleus of operative facts with a substantial federal claim.

The federal claims challenged the constitutionality of a Kansas statute, K.S.A. §65-1631, pursuant to the Fifth and Fourteenth Amendment guarantees of due process and equal protection under the following theories: (1) the statute was unconstitutionally vague; (2) the statute created an unreasonable classification; (3) the classification

was based on the suspect trait of alienage; (4) the appellant was denied a liberty interest to practice his chosen profession; and (5) the statute created an unauthorized delegation of legislative authority.

With respect to the first claim, the Kansas Supreme Court followed the pronouncement made by this Honorable Court in *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed. 2d 1485 (1957), which held that statutes which regulate the practice of a profession must be reasonable and advise registrants of the requirements imposed by law. K.S.A. §65-1631 was found to meet the above standard and was held not to be unconstitutionally vague. 231 Kan. at 518.

The Kansas Supreme Court found that the statute in question created two classes: (a) those who receive undergraduate or first professional degrees from a school or college of pharmacy accredited by the American Council on Pharmaceutical Education (ACOPE) or the department of a University accredited by ACOPE; and (b) all others.

Following decisions of this Honorable Court, the Kansas Supreme Court found that the standard for determination of whether the classification offends the equal protection clause involves a consideration of whether the state objective is furthered by the classification scheme. Utilizing the "reasonable basis" test as set forth in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961), the Court found that the requirements of K.S.A. §65-1631 concerning the accreditation of a pharmacist is based on the state interest in insuring the fitness and capacity of those who practice pharmacy in the State of Kansas. Furthermore, the State interest in developing a field of well qualified pharmacists is a legitimate one and the fact that filling a prescription and dis-

pensing dangerous drugs has such an obvious and direct impact on the public health problem hardly needs to be mentioned. 231 Kan. at 519. These important state interests give the Kansas legislature a wide range of discretion in classifying applicants for registration as pharmacists to assure that those who are licensed are highly qualified to practice. 231 Kan. at 520.

The accreditation requirements of K.S.A. §65-1631 were directly related to the state interest of providing a field of competent pharmacists. In both state and federal courts, educational accreditation requirements have been upheld as constitutional under the Fourteenth Amendment. See *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973); *Kadans v. Collins*, 441 F.2d 657 (9th Cir. 1971); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966), *cert. denied*, 389 U.S. 143 (1967); *Harris v. Louisiana State Supreme Court*, 334 F.Supp. 1289 (E.D. La. 1971); *In Re Stephenson*, 511 P.2d 136 (Alaska 1973).

Petitioner argues that the classification created by the Kansas statute, K.S.A. §65-1631, is based on the suspect trade of alienage. Cases involving suspect classifications or fundamental interests force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. *Gumbhir (II)*, *supra*, 231 Kan. at 521. The Kansas Supreme Court, however, found that K.S.A. §65-1631 created a classification based on education. There is no requirement in the statute which addresses citizenship or alienage.

> "The statute, in fact, classifies on the basis of education and distinguishes between applicants who education has met the standards and those who education has not met the standard." 231 Kan. at 521.

Additionally, the Kansas Supreme Court found that there is no constitutionally secured right of Petitioner to practice his chosen profession. In arriving at this conclusion, the Kansas Supreme Court relied on federal as well as state cases. *Gumbhir (II), supra,* 231 Kan. at 527.

Finally, Petitioner maintains the position that the unauthorized delegation of legislative authority which was found to be in violation of the Kansas constitution is also a violation of the Constitution of the United States. The Kansas Supreme Court disagreed. While perhaps this contention is most closely bound up with petitioner's state claim, under clear and established principles of federal constitutional law, the contention is wholly unsupportable. See *Ostroff v. New Jersey Supreme Court,* 415 F.Supp. 326 (D. N.J. 1976); *Potter v. New Jersey Supreme Court,* 403 F.Supp. 1036 (D. N.J. 1975), *aff'd,* 546 F.2d 418 (3d Cir. 1976); *Rossiter v. Colorado State Board of Bar Examiners,* No. C-4767 (D. Colo., filed August 26, 1975) (three-judge Court); *Lombardi v. Tauro,* 470 F.2d 798 (1st Cir. 1972), *cert. denied,* 412 U.S. 919 (1973); *Kadans v. Collins,* 441 F.2d 657 (9th Cir. 1971), *appeal dismissed,* 404 U.S. 1007, 92 S.Ct. 672, 30 L.Ed. 2d 656 (1972).

Highland Farms Dairy v. Agnew, 300 U.S. 608, 612, 57 S.Ct. 549, 81 L.Ed. 835 (1937) in which Justice Cardozo, speaking for the United States Supreme Court, held that.

> "The argument . . . is that in this there was a grant of discretionary power overpassing the limits of lawful discretion.
>
> The constitution of the United States . . . has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we

were dealing with an act of Congress. How powers shall be distributed by a state among its governmental organs is commonly, *if not always*, a question for the state itself." (Emphasis added).

The Kansas Supreme Court, while finding the Kansas legislature's action to be in violation of the Kansas constitution, correctly held that the same action was not a violation under federal constitutional principles. This is not the type of circumstances where an award of attorney's fees would serve to further the intent and purpose of The Civil Rights Attorney's Fees Award Act of 1976. The Kansas Court denied attorney's fees based on the finding that no civil right of the Petitioner had been violated. Indeed, to award attorney's fees in this instance would be tantamount to imposing on the state of Kansas an attorney's fees award act for Kansas constitutional violations, something the Kansas legislature has chosen not to do.

IV. CONCLUSION

Because §1983 establishes a cause of action when a party has suffered a deprivation of federally secured rights, privileges or immunities under color of state law, the essential question is to what extent and in what way is an award of attorney's fees to the prevailing party related to the cause of action established by §1983. Clearly, a party that does not prevail on §1983 grounds is not to be entitled to an award of attorney's fees. The Kansas Supreme Court, utilizing principles of federal constitutional law, affirmatively decided that no federally secured right, privilege or immunities of the petition had been abridged. The decision of the Kansas Supreme Court to deny attor-

ney's fees should stand and no writ of certiorari issue to the Kansas Supreme Court.

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APPENDIX

APPENDIX A

(Filed January 4, 1980)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS

No. 77221

ASHOK K. GUMBHIR,
Plaintiff,

vs.

KANSAS STATE BOARD OF PHARMACY,
Defendant.

MEMORANDUM DECISION

The Court announces the following Memorandum Decision on the cross motions of the plaintiff and defendant for summary judgment with Findings of Fact and Conclusions of Law as required by rule of the Kansas Supreme Court and as is provided by law.

(Nature of Action)

This is an appeal from a decision of the Kansas State Board of Pharmacy, hereinafter referred to as Board, denying the plaintiff's application for examination and registration as a licensed pharmacist under the provisions of K.S.A. 1979 Supp. 65-1631. The plaintiff prosecutes this appeal under the provisions of K.S.A. 1979 Supp. 65-1628. The appeal consists of two areas of inquiry. The first is an appeal from an administrative decision of the Board finding the plaintiff ineligible to register as a licensed pharmacist in Kansas under the provisions of

K.S.A. 1979 Supp. 65-1631 because he received his undergraduate degree in pharmacy from an unaccredited foreign university. The plaintiff alleges the Board erroneously interpreted §(a) of the statute which requires that an applicant for registration be a graduate of a college or school of pharmacy, or department of a university accredited by the American Council On Pharmaceutical Education, hereinafter referred to as ACPE. The plaintiff, a professor of pharmacy, contends that his master and PHD degrees from American universities with accredited departments of pharmacy qualify him for registration by examination under §(a) of the statute and that together with his licenses to practice pharmacy in Missouri and Ohio, his post-graduate degrees qualify him for reciprocal registration under §(d) of the statute. The Board, on the other hand, contents that the statute requires a baccalaureate degree from an accredited department and that the plaintiff's post-graduate degrees do not satisfy this requirement.

Under the second area of inquiry, the plaintiff contends that if the Court finds the interpretation given the statute by the Board is correct, that the Court find the statute to be unconstitutional. He alleges denial of due process, equal protection, and unlawful delegation of authority as grounds for the unconstitutional basis of the statute.

Both parties have filed motions for summary judgment. The motions have been fully briefed and argued before the Court.

(Issues)

The following issues are presented by the motions for summary judgment:

(1) Whether or not the Board acted unreasonably and without supporting evidence in concluding that plain-

tiff's post-graduate degrees did not qualify him for registration under the provisions of K.S.A. 1979 Supp. 65-1631 which requires that an applicant be a graduate of a program accredited by the ACPE?

(2) Whether or not the provisions of K.S.A. 1979 Supp. 65-1631 are violative of the due process, equal protection, or unlawful delegation of authority standards in the federal and state constitutions?

(Findings of Fact)

The pleadings, briefs, and arguments of the parties reflect the following uncontroverted facts:

1. The plaintiff, Ashok K. Gumbhir, manages and is part owner of Wycliff Pharmacy, a division of G-J-K-W, Inc., located at 10354 Mastin, Overland Park, Johnson County, Kansas.

2. The plaintiff is a citizen of the United States and a resident of the State of Missouri.

3. The defendant, Kansas State Board of Pharmacy, is an administrative agency of the State of Kansas, organized and existing pursuant to K.S.A. 1979 Supp. 74-1603, et seq.

4. The plaintiff graduated and received a bachelor's degreee in pharmacy from Punjab University in Chandrigarh, India, in 1960.

5. The plaintiff graduated and received a master of science degree in pharmacy from the University of Minnesota, Minneapolis, Minnesota in 1968.

6. The undergraduate pharmaceutical program of the University of Minnesota is, and was at all times relevant hereto, "a school or college of pharmacy or department of

a university accredited by the American Council on Pharmaceutical Education and recognized and approved" by the Kansas State Board of Pharmacy.

7. The plaintiff graduated and received a PhD degree in pharmacy administration from Ohio State University in Columbus, Ohio, in 1971.

8. The undergraduate pharmaceutical program of Ohio State University is, and was at all time relevant hereto, "a school or college of pharmacy or department of a university accredited by the American Council on Pharmaceutical Education and recognized and approved" by the Kansas State Board of Pharmacy.

9. The plaintiff was registered as a licensed pharmacist in the State of Ohio by the Ohio State Board of Pharmacy, by examination in 1970.

10. The plaintiff still holds a license to practice pharmacy in the State of Ohio.

11. The plaintiff was registered as a licensed pharmacist in the State of Missouri by the Missouri State Board of Pharmacy, by reciprocity, in 1974.

12. The plaintiff still holds a license to practice pharmacy in the State of Missouri.

13. The plaintiff applied for registration in the State of Kansas by examination, by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(b).

14. The plaintiff also applied for registration in the State of Kansas by reciprocity (to Missouri and Ohio) by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(d)(g).

15. The defendant, Kansas State Board of Pharmacy, denied the plaintiff's applications for registration on the basis of K.S.A. 1979 Supp. 65-1631 which provides in part:

> (a) It shall be unlawful for any person to practice as a pharmacist in this state, unless such person is registered by the board as a pharmacist. Every applicant for examination and registration as a pharmacist shall be of good moral character and temperate habits, a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education and recognized and approved by the board. . .
>
> (b) Notwithstanding the preceding provisions of this section, the board may in its discretion register as a pharmacist, without examination, any person who is duly registered by examination in some other state, provided that such person shall produce evidence satisfactory to the board of having had the required education and training . . . as required of applicants for registration under . . . the pharmacy act of this state.

16. The plaintiff timely filed this action in the District Court after receipt of a copy of the decision and order of the Kansas State Board of Pharmacy in accordance with K.S.A. 1979 Supp. 65-1628.

17. The plaintiff has exhausted all administrative remedies and prerequisites to the jurisdiction of this Court.

18. The American Council on Pharmaceutical Education does not accredit foreign or graduate schools such as those from which the plaintiff has graduated.

(Conclusions of Law)

I

THE BOARD ACTED REASONABLY AND WITH EVIDENCE TO SUPPORT ITS DETERMINATION THAT PLAINTIFF'S POST GRADUATE DEGREES DID NOT QUALIFY HIM FOR REGISTRATION UNDER THAT PORTION OF K.S.A. 1979 SUPP. 65-1631 WHICH REQUIRES THAT AN APPLICANT BE A GRADUATE OF A PROGRAM ACCREDITED BY THE AMERICAN COUNCIL ON PHARMACEUTICAL EDUCATION.

The first portion of the plaintiff's case concerns an appeal from an administrative decision. In this respect the scope of the Court's inquiry is, therefore, limited to whether the Board of Pharmacy acted within its scope of authority, whether there is evidence to support the contested determination by the Board, and finally whether the Board acted in a fraudulent, arbitrary, or capricious manner. See *Stice v. Gribben-Allen Motors, Inc.*, 216 Kan. 745 (1975); and *Neeley v. Board of Trustees*, 212 Kan. 137 (1973). There is a presumption in favor of the validity of the Board's action so that the burden of proving their action illegal rests upon the plaintiff. See *Moyer v. Board of County Commissioners*, 197 Kan. 23 (1966).

Plaintiff concedes that the Board was acting within the scope of the authority granted to it by the legislature to grant or deny applications for registration under the Pharmacy Act. The parties have agreed that the only issue in this portion of the case is whether the plaintiff's post graduate degrees qualify him for registration under the terms of K.S.A. 1979 Supp. 65-1631. However, in light of the limitations placed on judicial review of administrative decision, this issue must necessarily be phrased

as whether the Board acted reasonably and with supporting evidence when it made its determination.

An applicant for pharmacy examination and registration in the State of Kansas must meet the qualifications as provided in K.S.A. 1979 Supp. 65-1631(a). Under this statute every individual:

> "shall be of good moral character and temperate habits, *a graduate of a school or college of pharmacy or department of a university accredited by the American Council on Pharmaceutical Education and recognized and approved by the Board,* and shall file proof satisfactory to the Board, substantiated by proper affidavits, of a minimum of one year of pharmaceutical experience, acceptable to the Board, under the supervision of a registered pharmacist and shall pass an examination by the Board." (emphasis added)

Plaintiff argues that the statute should be interpreted to require only graduation from a school or college or department of a university which has a pharmaceutical program accredited by the ACPE and that it makes no difference whether the degree awarded is a bachelor's degree, a master's degree, or a doctorate degree. The Board correctly argues that this interpretation contravenes the clear language of the statute. They point out that the statute specifically requires that the school or college of pharmacy or the department of a university be accredited by the ACPE and that the latter accrediting agency does not accredit graduate degrees. It is clear to the Court that the statute refers to a program or course of study offered at such an educational institution and does not refer to the school or college in the broad sense. Typically, post graduate study is specialized and does not involve the broad range of skills which all general practitioners of the profession should possess.

The plaintiff's own post graduate record, which has been received and is on file in the record, supports this interpretation. Only four of the twenty-eight classes listed on his resume for graduate credit are classified under "pharmacy and pharmacology". The remaining classes fall under business and pharmacy administration. Most of his credits were earned in research from his dissertation topic entitled "Determination and Evaluation of Economic Significance of the Consumer Price Differentials Between Name and Generic Prescriptions".

A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to an obvious purpose the Court should follow the intent as expressed by the words used. See *City of Overland Park v. Nikias,* 209 Kan. 643, 498 P.2d 56 (1972) and *Underwood v. Allmon,* 215 Kan. 201, 523 P.2d 384 (1974). The unambiguous language of K.S.A. 1979 Supp. 65-1631 requires that the applicant be a graduate of the accredited program. This language is appropriate to the obvious purpose of the statute to protect the public health by assuring high qualifications of practicing pharmacists. On this basis, the Board's reasoning is sound that a graduate of graduate programs does not come within the language of the statute nor possess the qualifications that it requires.

To the contrary effect, the plaintiff offers only the broad statement that it is ridiculous to assume that a professor of pharmacy who possesses both a master and PhD degree in his field has not acquired the skills of a graduate of an accredited program. While there is merit in the plaintiff's statements, the contention misses the requirement of the statute, which simply requires the Board to determine whether the plaintiff was a grad-

uate of an accredited undergraduate pharmacy program, not whether he possessed the qualifications of such a graduate.

In making this determination, the Board did not solely rely on its own interpretation of the statute. As the administrative record reveals, the Board deferred its consideration of the plaintiff's applications until after it had requested and received an opinion of the Attorney General. See *Minutes of the Meeting of the Kansas State Board of Pharmacy*, February 11, 1978. That opinion advised that the Attorney General did not believe the plaintiff to be qualified to register under the provisions of K.S.A. 1979 Supp. 65-1631 or that the statute could be interpreted to allow the Board discretion to determine whether the plaintiff nonetheless possessed the qualifications of a graduate of an accredited program. This action on the Board's part refutes any implication that its final decision was in any respect fraudulent, arbitrary or capricious. Since the Board's decision was both reasonable and supported by evidence, this Court can find no basis upon which to set it aside.

II

THE PROVISIONS OF K.S.A. 1979 SUPP. 65-1631 DO NOT OFFEND CONSTITUTIONAL STANDARDS OF DUE PROCESS, EQUAL PROTECTION, OR UNLAWFUL DELEGATION OF AUTHORITY.

The plaintiff's first attack on the constitutionality of K.S.A. 1979 Supp. 65-1631 is that the statute violates the Due Process Clause of the Fourteenth Amendment because it is vague and ambiguous. He has provided little supporting argument for this contention other than a broad allegation that one reading the statute does not immediately comprehend that an applicant must be a graduate

of an undergraduate pharmacy program accredited by the ACPE. He does not propose the standard of clarity which he thinks the statute should meet.

The Board argues that the statute is non-criminal and must satisfy a less strict standard than a penal statute. It reasons that a statute which is non-criminal should be held unconstitutionally vague only when "its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice". *Annot. Supreme Court's Application of Vagueness Doctrine in Non-Criminal Statutes or Ordinances,* 40 L.Ed. 2d 823, 826 (1975). A non-criminal statute is not unconstitutionally vague "where it is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Id.*

Although K.S.A. 1979 Supp. 65-1631 does make the practice of pharmacy without a license unlawful, it does not prescribe a penalty and its overall effect indicates a legislative intent to regulate to protect the public good.

> "It is the substance and effect of the statute, rather than its form, that is to be considered in determining whether it is penal. Thus, laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good are not, in a strict sense, penal acts, although they may inflict a penalty for their violation." 82 C.J.S. §389 (footnotes omitted; *Director of Patuxent Institution v. Daniels,* 243 Md. 16, 221 A.2d 397, cert. denied, 385 U.S. 940 (1966).

It appears, then, that the Board has correctly classified the statute as non-criminal and identified the correct vagueness standard to apply.

The Board argues that K.S.A. 1979 Supp. meets this standard for the same reasons that support the Board's interpretation of the statute, that is, that the wording of the statute is clearly to the effect that the applicant must have graduated from the accredited program and that since the ACPE does not accredit graduate programs, the statute cannot sensibly be read to mean anything but an undergraduate program.

The statute is clear in that it requires graduation from a "school or college of pharmacy or department of a university accredited by ACPE". The ACPE does not accredit schools or colleges or graduate programs but accredits undergraduate programs within such schools or colleges. The statute as phrased does not create any ambiguity and the only determination that an applicant must make is whether or not the program in which he is enrolled or has graduated from is, in fact, accredited by the ACPE. The Court concludes that K.S.A. 1979 Supp. 65-1631 contains the necessary standard of clarity required of a non-criminal statute.

The plaintiff's next attack on the constitutionality of K.S.A. 1979 Supp. 65-1631 is that it violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiff accurately states that the Act establishes two distinct classes. The two classes being: (1) those who received undergraduate degrees from a school or college of pharmacy or department of a university; and (2) those who received undergraduate, graduate, or doctoral degrees from some other non-accredited schools of pharmacy. Plaintiff contends that the classification scheme has no sound basis for the alleged distinctions between them and cannot be upheld in light of the Equal Protection Clause of the federal constitution. He strenuously argues that since the ACPE does not accredit foreign schools, the classification is in

effect based on the suspect trait of alienage and so must be subjected to the strict scrutiny required by cases such as *Graham v. Richardson*, 403 U.S. 365 (1971).

As pointed out by counsel for the Board, the majority of cases which have been cited by the courts on the issue of equal protection and accreditation requirements have involved attorneys.

Most of the cases were brought by graduates of unaccredited law schools who had sought permission to take state bar exams but were denied the same for the reason that the state required that prior to taking the bar exam, an individual must have graduated from an accredited law school. The holdings in those cases have uniformly been that the requirement that one graduate from an accredited law school does not violate the Equal Protection Clause. In *Ostroff v. New Jersey Supreme Court*, 415 F. Supp. 326 (D. N.J. 1976) the Court in addressing an equal protection argument stated:

> "It is clear to this Court that the State has a rational basis for the requirement that applicants for admission to the State Bar be graduates of a law school approved by the American Bar Association. The basis for the requirement set forth in Rule 1:24-2(b) (requiring undergraduate schools to be accredited) is not as compelling as the prerequisite referred to above, this Court will not second guess the wisdom of the New Jersey Supreme Court in promulgating it. Under any of the descriptions of rationality heretofore used by Courts, we cannot say that there is a clear lack of connection between the rule and the plaintiff's fitness or capacity to practice law. The rule is not invidiously discriminatory and does not violate the equal protection clause of the 14th Amendment." (p. 329) Also, see *Wilson v. Board of Gov-*

ernors, Washington State Bar Association, Wash., 585 P.2d 136 (1978) and *In re Application of Brian M. Hansen,* 275 N.W. 2d 790 (1978).

After careful consideration of this argument the Court finds no basis for the plaintiff's contention that the statutory classification in this case is based on alienage. The statute, in fact, classifies on the basis of education and distinguishes between applicants whose education has met the standards of the ACPE and those whose education has not met those standards. Since the ACPE does not accredit foreign schools, it is quite possible that the latter class, those who have graduated from unaccredited schools, will contain a higher percentage of aliens, but aliens are not necessarily included in or excluded from either group. Put another way, since the statute does not require an applicant to be a citizen, an alien with an accredited education is every bit as welcome to apply for registration as is an American with the requisite education. In this respect, the plaintiff's reliance on the case of *Wong v. Hohnstrom,* 405 F. Supp. 727 (D. Minn. 1975), holding that the state of Minnesota could not constitutionally require applicants under its pharmacist registration statute to be U.S. citizens, is misplaced.

In this situation, the plaintiff's position is similar to that of an American applicant who has graduated from a school which has never applied for accreditation. In the case of *In re Application of Hansen,* 275 N.W. 2d 790 (Minn. 1978) a requirement that applicants to the Bar be graduates of ABA approved schools was upheld in the face of a challenge by an applicant who graduated from a school which was not accredited because it had never applied for accreditation. The Court found that since the requirement was reasonably related to the state's interest in a competent Bar it would be upheld and the Court

need not consider alternatives proposed by the plaintiff. In that case, as here, the plaintiff asked that the Board of Law Examiners be required to review his qualifications despite the accreditation requirement. The Court refused on the grounds that to require the Board to individually review the applications of all graduates of unaccredited schools would place too great a burden on the Board.

There still remains for consideration the plaintiff's claim that there is no sound reason for distinguishing between graduates of ACPE accredited schools and graduates of unaccredited schools. Since the classification created by the accreditation requirement is not based on alienage and since there is no "fundamental interest" involved, it is necessary only to find that the accreditation requirement is reasonably related to the state's interest in providing competent pharmacists to protect the public health. *St. ex rel Schneider v. Liggett,* 223 Kan. 610 (1978). This requires an examination of the standards which the ACPE uses in its accreditation process. Those standards relate to such important qualities of education as faculty-student ratios, classroom and clinical facilities, and financial resources of the pharmacy program. The direct relationship between these factors and the quality of education offered by a particular program is difficult to dispute. It has been noted by many courts, primarily in the context of bar admission cases. See e.g., *In re Application of Hansen,* 275 N.W. 2d 790 (Minn. 1978); *Wilson v. Board of Governors,* 585 P.2d 136 (Wash. 1978).

The state's interest in assuring a competent field of practicing pharmacists, as it is in assuring a competent Bar, is unquestionably great. The filling of prescriptions and dispensing of dangerous drugs has such an obvious and direct impact on the public health as hardly to need mentioning. This important state interest gives to the

legislature a wide range of discretion in classifying applicants for registration as pharamcists to assure that those who are licensed are highly qualified to practice. In such situations, the Equal Protection Clause does not require that the classifications be established with mathematical precision and in the absence of proof that the classification is arbitrary, unreasonable or unrelated to the statute's purpose, the fact that it may exclude a few qualified applicants must be tolerated. See *St. ex rel Schneider v. Liggett*, 223 Kan. 610 (1978), *Manzanares v. Bell*, 214 Kan. 589 (1974). In this case, the Court does not seriously doubt that the plaintiff may be a quite competent pharmacist but he has not met his burden of showing the classification of K.S.A. 65-1631 so unreasonable as to warrant this Court's invalidation of the statute on equal protection grounds.

The plaintiff's final attack on the constitutionality of K.S.A. 65-1631 is that it unlawfully delegates legislative power to a private organization outside the control of Kansas jurisdiction. The defendant supports the provision by citing numerous case, again in the context of the legal profession, which have rejected this argument. See e.g., *Appeal of Murphy*, 393 A.2d 369 (Pa. 1978); *Potter v. N.J. Supreme Court*, 403 F. Supp. 1036 (D. N.J. 1975); *In re Application of Hansen*, supra. These cases have held that the courts (who promulgate attorney standards) have not delegated authority but adopted the standards of the accrediting agency in order to avoid the inconvenience and burden resulting to the licensing board by requiring that it review individually the educational institution of each applicant. He argues, on the basis of *Water Dist. 1 v. Robb*, 182 Kan. 2 (1957) that in this instance the legislature has merely delegated to the ACPE the

power to determine some fact or state of things upon which the law becomes effective.

In order to ascertain the effect of the clause at issue, it is necessary to examine it in context. The sentence reads, "Every applicant . . . shall be . . . a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education *and recognized and approved by the board . . .*" (emphasis added). It is clear that the delegation of authority by the statute goes to the Board, not to the ACPE. In other words, as the defendant argues, the clause requiring accreditation is not a delegation to the ACPE without guiding standards, rather, it is the standard by which the Board of Pharmacy is to exercise the power delegated to it. The reference to the ACPE merely allows the Board to factually determine whether the applicant's educational background meets the standards which the legislature believes requisite of a competent pharmacist.

The ACPE is comprised of professional educators and pharmacists who are better qualified to determine the competency of any pharmaceutical education than the legislators or the Board. It is not unreasonable for the legislature to rely on that expertise. To the contrary, if it were not to do so, it would be necessary to develop a comprehensive set of standards for the Board of Pharmacy to use in determining the sufficiency of each applicant's education. Moreover, requiring the Board to investigate the program offered by each applicant's school would be a time consuming and expensive job. Instead, the legislature has chosen to rely on the standards chosen by experts in the field of accrediting and free the Board to spend time on its other important functions.

(Decision)

This Court has carefully considered the pleadings and briefs filed by the respective parties and the arguments of counsel. After due consideration thereof, and for the reasons set out above, this Court has determined that the defendant's motion for summary judgment should be granted and the plaintiff's motion for summary judgment should be denied. The decision of the Board of Pharmacy to deny the plaintiff's applications for registration was not arbitrary, capricious or fraudulent. Nor is K.S.A. 1979 Supp. 65-1631 unconstitutionally vague, violative of equal protection or an unlawful delegation of legislative authority. Therefore, the defendant's motion for summary judgment is granted. The attorney for defendant is directed to prepare a journal entry reflecting the above findings and order and may incorporate the above memorandum decision therein.

/s/ Herbert W. Walton
Herbert W. Walton
District Judge
Division No. 1

January 4, 1980

APPENDIX B

(Filed July 9, 1981)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

Case No. 77221

ASHOK K. GUMBHIR,
Plaintiff,

v.

KANSAS STATE BOARD OF PHARMACY,
Defendant.

MEMORANDUM DECISION

The Court announces the following memorandum decision on the plaintiff's motion for assessment of costs of this matter to the defendant and in favor of the plaintiff, pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988.

(Nature of Action)

This action arises out of litigation undertaken by the plaintiff in order to secure registration to practice pharmacy in the State of Kansas. In this motion plaintiff requests that the Court assess the costs incurred in obtaining such registration to the defendant Kansas State Board of Pharmacy. The following is a brief history of the facts of the case.

The plaintiff, a United States citizen and Missouri resident, applied for registration in the State of Kansas by examination and by reciprocity. He was denied regis-

tration by the Kansas State Board of Pharmacy, hereinafter referred to as the Board, based on the Board's interpretation of K.S.A. 1979 Supp. 65-1631.

Plaintiff appealed the Board's decision under the provisions of K.S.A. 1979 Supp. 65-1628, under two separate theories. Under the first theory plaintiff alleged that the Board erroneously interpreted section (a) of the statute, which requires that an applicant for resigtration be a graduate of a college or school of pharmacy, or department of a university accredited by the American Council on Pharmaceutical Education, hereinafter referred to as ACOPE.

Secondly, plaintiff contended that the statute was unconstitutional. The primary attack against the constitutionality of this statute was the claim that K.S.A. 65-1631 (a) of the Kansas Pharmacy Act constituted an unlawful delegation of legislative authority to a nongovernmental agency, ACOPE, which delegation is impermissible under the Constitution of the State of Kansas. Plaintiff also included in his petition a more general allegation that the statute was discriminatory and violative of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

After receiving the adverse decision by the Board, plaintiff appealed the Board's decision by filing an action in the District Court of Johnson County. In an opinion filed January 4, 1980, the Board's order denying the plaintiff's registration was upheld.

Plaintiff then appealed the District Court decision to the Kansas Supreme Court. The Supreme Court reversed the District Court decision in an opinion filed November 1, 1980. The Court's decision was based upon a finding that K.S.A. 1979 Supp. 65-1631(a) was violative of the Kansas

Constitution, Article 2, section 1, because the statute resulted in an unconstitutional delegation of legislative authority to a non-governmental agency.

Having decided that this portion of the statute was constitutionally impermissible, the Supreme Court found it unnecessary to examine the other constitutional questions and issues raised by the plaintiff concerning the Board's refusal to permit examination and registration. *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 569, 588, ... P2d ..... (1980).

On April 10, 1981, plaintiff filed a "Motion for Assessment of Costs," requesting that the Court assess all costs and attorney's fees incurred in this matter against the defendant. While plaintiff cited both federal and state statutes as the basis for his motion, he indicated his intention at oral argument held on May 28, 1981 to rely primarily on 42 U.S.C. §1988 as authority entitling him to costs and fees incurred in obtaining registration. Therefore this issue will be decided on the basis of 42 U.S.C. §1988.

(Issue)

Whether plaintiff should be permitted to recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 if he is the prevailing party in a state court action which does not allege a violation of section 1983, and which is decided on the basis of a violation of the state constitution.

(Conclusions of Law)

In this case of apparent first impression in the State of Kansas, the Court has the duty to interpret the meaning and scope of 42 U.S.C. §1988, as it applies to the facts of this case. Plaintiff, the prevailing party on the substantive

issues presented in this proceeding, now asks this Court to assess the costs and attorney's fees involved in appealing the Board's decision to the Kansas Supreme Court to the defendant.

The pertinent portion of the statute, 42 U.S.C. §1988, reads as follows: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

The Court is mindful that the purpose of the 1976 amendment to section 1988 was to encourage the private citizen to take action, as a "private attorney general," to enforce civil rights laws and that the law should be construed to effectuate its purpose. 5 *U.S. Code Cong. & Admin. News,* pp. 5908, 5909-5910; *Young v. Toia,* 413 N.Y.S. 2d 530, 531 (1979).

At the same time the language of the amendment clearly indicates that the awarding of attorney's fees lies within the sound discretion of the Court. *Young,* supra, 413 N.Y.S. 2d at 532.

Section 1983 establishes a cause of action whereby a party who has suffered a deprivation of a federally secured right, privilege, or immunity under color of state law can obtain appropriate relief. The question, therefore, is to what extent is the awarding of attorney's fees to the prevailing party in this lawsuit related to the cause of action established by section 1983. *The Enforceability and Proper Implementation of §1983 and the Attorney's Fees Awards Act in State Courts,* 20 Ariz. L. Rev. 743, 762 (1980).

Perhaps even more to the point is whether plaintiff has in fact prevailed on a section 1983 claim. The defendant strenuously asserts that he has not. Defendant's brief points out that the statute was found to be unconstitutional

by the Kansas Supreme Court because it constituted an unlawful delegation of authority by the Kansas Legislature.

Indeed, this issue was raised by the plaintiff within the context of the rights and privileges secured under the Kansas Constitution. In fact Plaintiff's petition makes no mention of 42 U.S.C. §1983 in asserting a cause of action against the Board.

Plaintiff asserts that his petition stated a cause of action against the Board under 42 U.S.C. §1983, and that it is not necessary that the statute be specifically cited in the petition in order for him to prevail on this claim for costs, including attorney's fees. He cites as support *Harradine v. Board of Supervisors,* 425 N.Y.S. 2d 182 (1980), where such relief was granted even in the absence of a specific reference to §1983.

In *Harradine*, an appeal was taken by a county board of supervisors from an order requiring it to pay legal fees to plaintiff's attorneys in a voting rights case involving the "one person-one vote" rule. The issue presented to the New York court was whether the plaintiff was entitled to recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 if he is the prevailing party in a state court suit which does not allege a violation of section 1983, but seeks to enforce federal civil rights. 425 N.Y.S. 2d at 187. The New York Court of Appeals found that he was:

> "in view of the number of apportionment cases brought in federal court pursuant to section 1983, the similarity in language of section 1983 and section 1 of Article 1 of the New York State Constitution, the policy behind section 1988 which is to encourage the private citizen to take action as a 'private attorney general,' and the

> fact this action is premised upon a constitutional claim. . . . Plaintiff's cause of action is embraced within the spirit of section 1983 and Special Term implicitly found a violation of this section." [citation omitted]

425 N.Y.S. 2d at 188.

The same consideration, however, is not present in this case. There is no similarity in language between section 1983 and section 1 of Article 2 of the Constitution of the State of Kansas. There is little evidence to support plaintiff's cause of action premised upon a federal constitutional claim, other than a general allegation that the statute is unconstitutional because it violates plaintiff's constitutional rights under the due process and equal protection clauses of the Kansas and United States Constitutions.

Finally, there has been no showing by the plaintiff that his cause of action is embraced within the spirit of section 1983, which prohibits the infringement of "rights, privileges, or immunities secured by the [U.S.] Constitution and laws," nor that the Kansas Supreme Court implicitly found a violation of this section.

Section 1983 redresses neither common law nor state protected rights. *Morrison v. Fox*, 483 F. Supp. 390, 395 (W.D.Penn. 1979); *Civil Rights Suits Against State and Local Governmental Entities and Officials*, 53 So. Calif. L. Rev. 945, 952 (1980). The Kansas Supreme Court's decision in this case rested squarely upon state constitutional grounds. Rights guaranteed solely by the state constitution and state law are not actionable under 42 U.S.C. §1983. *Shutt v. Moore*, 613 P.2d 1188, 1190 (Wash. App. 1980)

The plaintiff's allegations of constitutional violations under the First, Fifth, and Fourteenth Amendments of the

United States Constitution are neither specific nor supported by facts and cannot provide the basis for granting plaintiff attorney's fees under the Act. *Shutt*, supra, at 1190.

Although the foregoing discussion is determinative of the outcome of the case, two other points raised in the parties' briefs deserve some discussion.

First, defendant states that section 1983 was intended to give a cause of action to plaintiffs in federal courts exclusively. According to the defendant's brief the statute was intended to provide aggrieved plaintiffs a remedy to redress abuses of power by state officials and therefore "it seems antithetical that the statute would grant two states the authority to review such actions."

While the development of section 1983 has led to a good deal of confusion over the jurisdictional grant of the statute, the majority of courts and legal commentators have agreed that section 1983 provides concurrent jurisdiction between state and federal courts. 20 *Ariz. L. Rev.* at 744; *Harradine v. Board of Supervisors*, 425 N.Y.S. 2d 182, 188, n.7 (1980).

State courts clearly have concurrent jurisdiction to entertain claims under section 1983. *Shapiro v. Columbia Union National Bank & Trust Company*, 576 S.W. 2d 310 (Mo. 1978), cert. den. 444 U.S. 831, 100 S. Ct. 60, 62 L. Ed. 2d 40.

The defendant's argument in this regard is very similar to that made by the defendant in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), that is, jurisdiction to hear section 1983 claims rests exclusively with the federal courts. On this issue the Supreme Court held that "any doubt that state courts may also entertain such actions was dispelled by *Martinez v. California*, 444 U.S. 277, 283, n. 7, 100 S. Ct.

553, 558, n. 7, 62 L.Ed. 2d 481 (1980)." There, while reserving the question whether state courts are obligated to entertain §1983 actions, the Supreme Court held that Congress had not barred them from doing so. *Maine v. Thiboutot*, 100 S.Ct. 2502, 2503, n. 1 (1980).

The point to be made here is that under the proper circumstances a section 1983 claim may be brought in a Kansas state court, and an award of attorney's fees may be granted to the prevailing party under section 1988. *Harradine v. Board of Supervisors*, supra, is illustrative of the kind of circumstances in which a plaintiff is awarded attorney's fees in order to effectuate the remedial purposes of the Act. Plaintiff's cause of action against the State Board of Pharmacy, however, is not of that nature which the drafters of this legislation intended to include within its purview.

Mention must also be made of the contention made by the defendant that the State Board of Pharmacy is not a "person" within the meaning of section 1983, which creates a civil action for the deprivation of rights, privileges, or immunities secured by the Constitution and laws by "persons" acting under color of state law. The defendant asserts that under current case law departments and agencies of state, county, or local governments are not "persons" for 1983 purposes. *Cullen v. N.Y. State Civil Services Commission*, 435 F. Supp. 546 (E.D.N.Y. 1977).

The federal district court in *Cullen*, supra, while acknowledging that there is "no rule of thumb . . . controlling on the question whether independent agencies are to be considered 'person' (for) the purposes of section 1983," 435 F. Supp. at 556, proceeds to list several factors which have been mentioned in case law as relevant as to whether a state agency is a "person" under section 1983.

Among those factors are the following:

(1) whether the agency's funds are appropriated by the state for its use as though it were a state department;

(2) whether the state is liable for the agency's debts; and

(3) whether the agency performs a function of government that serves the public interest.

435 F. Supp. at 557.

The concept of what is included with the term "person" for 1983 purposes continues to evolve, as recent United States Supreme Court cases indicate. See, e.g., *Monell v. Department of Social Services*, 426 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

In *Cullen*, supra, the civil service commissions named as defendants were simply "departments" of state, county, and municipal governments and therefore could not be considered persons within the meaning of the statute. Whether the same could be said of the Kansas State Board of Pharmacy is a question which the Court is not called upon to decide in this opinion, in light of the holding that plaintiff has not prevailed upon a section 1983 claim in the case and therefore is not entitled to an award of attorney's fees under section 1988.

Nor should this decision be read as an endorsement of the specific test enunciated in the *Cullen* case. While these factors may be helpful in determining whether a state agency is a "person" for 1983 purposes, they should by no means be considered the only relevant elements necessary to make such a determination in the proper case.

(Decision)

After careful consideration of the memoranda and briefs submitted by the parties, and for the reasons stated above, it is the decision of this Court that plaintiff's "Motion for Assessment of Costs" pursuant to 42 U.S.C. §1988, commonly known as the "Civil Rights Attorney's Fees Awards Act of 1976" be denied.

Counsel for the defendant is directed to prepare the Journal Entry of this decision and is granted leave to incorporate the memorandum decision in the journal by reference.

/s/ Herbert W. Walton
Herbert W. Walton
District Judge
Division No. 1

July 9, 1981